RECORD AND BRIEF.

No. 15-497

IN THE

Supreme Court of the United States

STACY FRY, ET VIR., AS NEXT FRIEND OF MINOR E.F.,
Petitioners,

v.

NAPOLEON COMMUNITY SCHOOLS, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICI CURIAE NATIONAL SCHOOL BOARDS ASSOCIATION, MICHIGAN SCHOOL BOARDS ASSOCIATION, AASA THE SCHOOL SUPERINTENDENTS ASSOCIATION, ASSOCIATION OF SCHOOL BUSINESS OFFICIALS INTERNATIONAL, AND NATIONAL ASSOCIATION OF STATE DIRECTORS OF SPECIAL EDUCATION IN SUPPORT OF RESPONDENTS

Francisco M. Negrón, Jr.
General Counsel
National School Boards Association
1680 Duke Street, FL 2
Alexandria, VA 22314
(703) 838-6722
fnegron@nsba.org

Thomas B. Allen
Counsel of Record
W. Joseph Scholler
Alexander L. Ewing
Jack B. Hemenway II
Frost Brown Todd LLC
9277 Centre Point Dr.
Suite 300
West Chester, OH 45069
(513) 870-8200
tallen@fbtlaw.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

QUESTION PRESENTED 1

INTERESTS OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

I. THE IDEA'S LONG-STANDING EXHAUSTION REQUIREMENT MUST BE INTERPRETED IN THE CONTEXT OF ITS COLLABORATIVE FRAMEWORK 6

A. Allowing Students and Parents To Proceed Directly to Court to Pursue Damages Claim Under Section 504 or the ADA Without Exhausting Administrative Processes Directly Contravenes the Intent of Congress 6

B. Congress Consistently and Clearly Has Required Exhaustion in Disputes About Services for Students with Disabilities 9

II. WEAKENING THE IDEA'S EXHAUSTION REQUIREMENT WOULD UNDERMINE THE COLLABORATIVE FRAMEWORK CONGRESS DESIGNED TO RESOLVE EDUCATIONAL MATTERS CONCERNING STUDENTS WITH DISABILITIES 11

A. Allowing Parents to Pursue ADA and Section 504 Claims Without First Exhausting IDEA Procedures Will Fundamentally Alter the IEP Process 11

B. Allowing Circumvention of IDEA's Due Process Procedures to Provide Direct Access to Federal Courts Would Forfeit the Benefits of the Administrative Scheme Congress Designed for Resolving Disputes about Appropriate Programs and Services for Students with Disabilities 16

1. The Vast Majority of Due Process Complaints Are Resolved Without Protracted Hearings..... 16

2. Due Process Hearing Officers with Particularized Knowledge and Training in Special Education Law and Hearing Procedures Offer Important Benefits..... 19

3. IDEA Due Process Procedures Include Important Elements That Seek to Reduce the Burdens of Contested Hearings 22

CONCLUSION 27

TABLE OF AUTHORITIES

Page

Cases

Ardestani v. I.N.S.,
502 U.S. 129 (1991) 6

Board of Educ. of Victor Central Sch. Dist., 27 IDELR 1159 (SEA NY 1998) 24

Brown v. TD Bank, N.A.,
2016 WL 1298973 (E.D. Pa. Apr. 4, 2016) 27

Case v. East Meadow Union Free Sch. Dist., 514 F.3d 240 (2d Cir. 2008) 13

Christopher W. v. Portsmouth Sch. Comm., 877 F.2d 1080 (1st Cir. 1989) 21

D.E. v. Central Dauphin Sch. Dist.,
765 F.3d 260 (3d Cir. 2014) 11

Food and Drug Admin. v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 6

Fry v. Napoleon Cmty. Sch.,
788 F.3d 622 (6th Cir. 2015) 16

LBDE Pub. Schs. v. Massachusetts Bureau of Special Educ. Appeals,
59 IDELR 284 (D. Mass. 2012) 24

New Jersey v. T.L.O.,
469 U.S. 325 (1985) 22

Rose v. Yeaw,
214 F.3d 206 (1st Cir. 2000) 21

Salisbury Township Sch. Dist.,
26 IDELR 919 (SEA PA 1997) 24

Smith v. Robinson,
468 U.S. 992 (1984) 9, 11

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) 22

Statutes and Regulations

Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12201 *et seq.* ..... passim

Education for All Handicapped Children Act (EHA), Pub. L. No. 94-142 § 615, 89 Stat. 773 (1997) 9

Education of the Handicapped Act Amendments of 1986, Pub. L. No. 99-457 § 680, 100 Stat. 1145 (1986) 9

Individuals with Disabilities Education Improvement Act (IDEA), Pub. L. No. 108-446, 118 Stat. 2647 (2004), codified at 20 U.S.C. § 1400 *et seq.* ..... passim

Rehabilitation Act of 1973,
29 U.S.C. § 701 *et. seq.* ..... passim

20 U.S.C. § 1400(c)(8) (2016) 6
20 U.S.C. § 1400(d)(1) (2016) 8
20 U.S.C. § 1400(d)(1)(3) (2016) 6
20 U.S.C. § 1412(a)(2) (2016) 11
20 U.S.C. § 1414(b)(2)(A) (2016) 6
20 U.S.C. § 1414(b)(4)(A) (2016) 6
20 U.S.C. § 1414(d)(1) (2016) 7
20 U.S.C. § 1414(d)(1)(A) (2016 11
20 U.S.C. § 1414(d)(1)(B) (2016) 7
20 U.S.C. § 1415(e) (2016) 7
20 U.S.C. § 1415(f)-(g) (2016) 7-8
20 U.S.C. § 1415(f)(3) (2016) 16
20 U.S.C. § 1415(f)(3)(A) (2016) 19
20 U.S.C. § 1415(i)(2)(A) (2016) 10
20 U.S.C. § 1415(i)(3)(B)-(G) (2016) 24
20 U.S.C. § 1415(l) (2016) 1, 10
20 U.S.C. § 1415(f)(3)(E)(ii) (2016) 7

34 C.F.R. § 300.507(b) (2016) 23
34 C.F.R. § 300.510 (2016) 17
34 C.F.R. §§ 300.510-515 (2016) 16
34 C.F.R. § 300.511(c)(1)(ii) (2016 19
34 C.F.R. § 300.512(a)(3) (2016) 23
34 C.F.R. § 300.512(b) (2016) 23
34 C.F.R. § 300.515(a) (2016) 17
34 C.F.R. § 300.515(b) (2016) 17
34 C.F.R. § 300.515(c) (2016) 17
34 C.F.R. § 300.603 (2016) 18

8 VA. ADMIN. CODE § 20-81-210(D) (2016) 20
19 TEX. ADMIN. CODE § 89.1175 (2016) 24
CAL. CODE REGS. tit. 5, § 3082 (2016) 23
MISS. ADMIN. CODE § 7-4-1: 300.512 (2016) 24
MISS. ADMIN. CODE § 32-21: 4.3 (2016) 23
NEV. ADMIN. CODE § 645.560 (2016) 23
N.Y. COMP. CODES R. & REGS., tit. 19, §400.8 (2016) 23
Vermont Rule 2365.1.6.15(e) (2016) 17

Other Authorities

15th National Academy for IDEA Administrative Law Judges and Hearings Officers, Seattle University School of Law (July 12-15, 2016) *available at* https://law.seattleu.edu/continuing-legal-education/idea-academy 20

Assistance to States for the Education of Children with Disabilities and Preschool Grants of Children with Disabilities: Final Rule, 71 Fed. Register 46,540 (Aug. 14, 2006) 19

David Margolick, *Burger Says Lawyers Make Legal Help Costly*, N.Y. TIMES (Feb. 13, 1984), *available at* http://www.nytimes.com/1984/02/13/us/burger-says-lawyers-make-legal-help-too-costly.html 4

Facilitated Individualized Education Program (FIEP) Procedures: A Guide for Families and Districts, Office of Special Education West Virginia Department of Education (Aug. 2015), *available at* http://wvde.state.wv.us/osp/compliance/documents/fiep_procedures_guide.pdf 26

Hearing Officer Deskbook: A Reference for Virginia Hearing Officers, Office of the Executive Secretary of the Supreme Court of Virginia (Revised Dec. 2013), *available at* http://www.courts.state.va.us/programs/ho/deskbook.pdf 20

Illinois State Board of Education, Special Education Due Process Hearing Officer Qualifications and Duties, *available at* www.isbe.net/spec-ed/pdfs/dp-hearing-officer-qual.pdf 19

Jim Gerl, *Bench Skills for Hearing Officials: Conduct and Control of Administrative Hearings*, (November 16-19, 2014), *available at* http://todaycms.s3.amazonaws.com/naho/00/cd38f05bc211e48fab03cef238b12c/Conduct-and-Control-of-Admin-Hearings.pdf 24

John Copenhaver, *Due Process Hearing Officer Manual*, Mountain Plains Regional Resource Center Utah State University (Revised 2007), *available at* http://www.directionservice.org/cadre/exemplar/artifacts/BIE-9%20DPHO%20manual.pdf 15

Julie Gentili Armbrust, *IEP Facilitation: Tips of the Trade*, Mediation Northwest (Oct. 1, 2010), *available at* http://www.ode.state.or.us/wma/teachlearn/conferencematerials/sped/2010/iepfacilitationtraining.pdf..... 26

National Center on Dispute Resolution in Special Education, *available at* www.directionservice.org/cadre..... 8

NYSED Resources for Impartial Hearing Officers, Office of Special Education of the New York State Education Department and Special Education Solutions, L.L.C., *available at* http://www.spedsolutionsgroup.com/index.html..... 20

Perry A. Zirkel and Zorka Karanxha, *Creeping Judicialization In Special Education Hearings?: An Exploratory Study*, University of South Florida Scholar Commons (July 2007), *available at* http://scholarcommons.usf.edu/cgi/viewcoment.cgi?article=1038&context=els_facpub..... 25

Texas Education Agency, Division of Special Education, Hearing Officers: Qualifications and Job Requirements, *available at* http://ritter.tea.state.tex.us/commissioner/qualif.html 19

Tracy G. Mueller, *Alternative Dispute Resolution: A New Agenda for Special Education Policy*, 20 J. OF DISABILITY POL. STUDIES 4-13 (2009) 25

U.S. Department of Education, EDFacts: IDEA Part B Dispute Resolution Survey, 2013-14, *available at* www.ed.gov/programs/osepidea/618-data/static-tables/index.html 18

U.S. Department of Justice, Bureau of Justice Statistics, Special Report, Civil Rights Complaints in U.S. District Courts 1990-2006, Table 8 (Aug. 2008) *available at* www.bjs.gov/content/pub/pdf/cvrusdc06.pdf 18

QUESTION PRESENTED

Whether 20 U.S.C. § 1415(l) requires Petitioners to exhaust the state administrative procedures set forth in the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, before filing a civil action seeking monetary and declaratory relief under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12201 *et seq.*, and the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*

INTERESTS OF *AMICI CURIAE*

In accordance with Supreme Court Rule 37, *Amici Curiae*, National School Boards Association (NSBA), Michigan Association of School Boards (MASB), AASA The School Superintendents Association (AASA), Association of School Business Officials, International (ASBO), and National Association of State Directors of Special Education (NASDSE) respectfully submit this brief in support of the Respondents.[1] **NSBA** is a national organization that represents state school boards associations and their more than 90,000 local school board members. NSBA believes education is a civil right and that public education is America's most vital institution.

---

[1] All parties have consented to the filing of this brief under Rule 37.3(a). Letters showing such consent have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to the preparation and submission of this brief.

NSBA advocates for equity and excellence in public education through school board leadership. NSBA is the premier advocate for public education in the United States. **MASB** is a voluntary, nonprofit association of local and intermediate boards of education throughout the State of Michigan, whose membership consists of boards of education of over 600 local school boards and intermediate school boards in the state. The mission of MASB is to provide quality educational leadership services for all Michigan boards of education, and to advocate for student achievement and public education. **AASA** is the professional organization for more than 13,000 educational leaders in the United States and throughout the world. AASA members advance the goals of public education and champion children's causes in their districts and nationwide. As school system leaders, AASA members set the pace for academic achievement and help shape policy, oversee its implementation and represent school districts to the public at large. **ASBO** is an educational association that supports school business professionals who are passionate about quality education. ASBO provides programs, services, and a global network to promote the highest standards of school business management, professional growth, and the effective use of educational resources. ASBO's mission is to lead the profession of school business forward through professional growth opportunities, programs, and services. **NASDSE** is a not-for-profit organization established in 1938 to promote and support education programs and related services for children and youth with disabilities. NASDSE's primary mission is to serve students with disabilities

by providing services to state educational agencies to facilitate their efforts to maximize educational and functional outcomes for students with disabilities.

Amici have a profound interest in how this case is resolved because the Court's decision will impact the ability of schools across the nation to address effectively the needs of special education students. *Amici* and their members believe that all children should have equal access to an education that maximizes each student's individual potential. To accomplish this goal, *Amici*, without addressing the specific facts of this case, seek to offer arguments and information that will help this Court reach a decision reinforcing the use of collaborative means to resolve the disagreements that arise between parents and schools about special education matters. To that end, we urge this Court to affirm the decision of the Sixth Circuit Court of Appeals.

SUMMARY OF ARGUMENT

It is critical that this Court affirm the decision of the Sixth Circuit Court of Appeals, which held that students with disabilities are required to exhaust the IDEA administrative processes before bringing a suit in court to challenge a school district's provision of services or accommodations related to their disabilities. A strong exhaustion requirement supports the carefully crafted, collaborative framework Congress designed for students, parents, and school districts to develop a comprehensive and integrated education program for a child. Through the interactive and constructive process envisioned by the IDEA, students, parents, educational experts, and other stakeholders work together to develop an

individualized education program (IEP) tailored to meet the child's unique needs. Key to this end goal is ongoing parental communication with educators, therapists, and other experts who have the knowledge and training to devise an appropriate, minimally restrictive, and individually tailored education program for the student. This process helps stakeholders develop solutions that work for everyone.

In the event the parents and school cannot agree through this cooperative team approach on the appropriate special education and related services needed by the child, Congress has provided due process procedures with specified timelines as the primary means to address disagreements. These procedures are designed to encourage informal and early resolution. Litigation, by contrast, is designed to be confrontational; it is inherently inefficient as a dispute resolution mechanism,[2] and is incompatible with the mutual exchange between home and school critical to student well-being and academic success. Allowing litigation as a *first* resort encourages the parties needlessly to adopt adversarial stances rather than taking advantage of the IDEA's collaborative framework. The parties' focus shifts to marshalling evidence, often including expert testimony, to support entrenched positions and to executing adversarial strategies that often have little to do with benefitting

---

[2] "Our system is too costly, too painful, too destructive, [and] too inefficient for a truly civilized people." David Margolick, *Burger Says Lawyers Make Legal Help Costly*, N.Y. TIMES (Feb. 13, 1984), *available at* http://www.nytimes.com/1984/02/13/us/burger-says-lawyers-make-legal-help-too-costly.html (quoting Chief Justice Burger's annual "State of the Judiciary" address to the American Bar Association on Feb. 12, 1984).

the education of the student. An open door to litigation mires students, parents, and school districts in unnecessary, time-consuming, and expensive court proceedings that drain resources that could be used to serve the needs of students with disabilities.

The Sixth Circuit Court of Appeals properly concluded that the parents of a student with a disability must exhaust the procedures under the IDEA before filing suit against the school district for denying the student's request to bring a service dog to school. The parents instead must engage in the continuum of collaborative processes, including the due process procedures outlined in the IDEA, before they may invoke another statute to compel a school to provide a particular related service. Unlike other would-be plaintiffs who allege the need for a service dog to access other government or public facilities or programs, a student eligible for services under IDEA is entitled to its considerable procedural protections, and an individualized education program designed by experts with parent input. In exchange, she must use IDEA's procedures to resolve disputes associated with that program before resorting to litigation. *Amici* respectfully urge this Court to affirm the Sixth Circuit's decision and hold that before filing Section 504 or ADA claims in court, students and their families must exhaust administrative remedies under the IDEA when the relief they seek is also available under the IDEA.

I. THE IDEA'S LONG-STANDING EXHAUSTION REQUIREMENT MUST BE INTERPRETED IN THE CONTEXT OF ITS COLLABORATIVE FRAMEWORK.

A. Allowing Students and Parents to Proceed Directly to Court to Pursue a Damages Claim Under Section 504 or the ADA Without Exhausting Administrative Processes Directly Contravenes the Intent of Congress.

Statutory interpretation begins with a review of the language itself, *Ardestani v. I.N.S.*, 502 U.S. 129, 135 (1991), read in the context of the overall statutory scheme.[3] IDEA's framework clearly shows the intent of Congress that the special education needs of students be addressed collaboratively by parents and schools.[4] When viewed as an integral

---

[3] *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (citations omitted) ("A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme' and 'fit, if possible, all parts into an harmonious whole[.]'").

[4] *See, e.g.*, 20 U.S.C. § 1400(c)(8) ("Congress finds the following: Parents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways."); § 1400(d)(1)(3) ("The purposes of this chapter are to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities "); § 1414(b)(2)(A) ("In conducting the evaluation [to determine if the child is a child with a disability], the local educational agency shall use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining [whether the child has a disability and the content of the child's IEP.]"); § 1414(b)(4)(A) ("[T]he

part of this framework, the exhaustion requirement emerges as the lynchpin ensuring that the positive, constructive mechanisms set in place by Congress have a chance to work. Before litigation ever becomes an option, the exhaustion requirement ensures that: 1) an IEP Team, including the parents, has met to discuss the educational needs of the child, to consider available services and placements that might meet those needs, and to develop individualized educational goals for the child and benchmarks to assess attainment of those goals, 20 U.S.C. § 1414(d)(1); 2) the parties have engaged in a resolution session and/or mediation to resolve any disagreements regarding the education of a student with a disability prior to the commencement of a due process hearing; and 3) in the event a due process hearing remains necessary, that an impartial state official trained in special education matters has reviewed, and ruled on, those disagreements. *See* 20 U.S.C. § 1415(f)-(g) (setting out how disagreements regarding the education of a student with a disability

---

determination of whether the child is a child with a disability shall be made by a team of qualified professionals and the parent of the child "); § 1414(d)(1)(B) (the IEP Team consists of the parents of the child with a disability, at least one regular education teacher, at least one special education teacher or provider, and a representative of the local education agency); § 1414(d)(3)(A)(ii) ("In developing each child's IEP, the IEP Team shall consider the concerns of the parents for enhancing the education of their child"); § 1415(e) (providing for mediation of disputes between parents and the local education agency to resolve due process complaints); § 1415(f)(3)(E)(ii) (providing that it is a procedural violation if the procedure "significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child[.]").

are to be resolved, including resolution meetings, hearings, and appeals to state agencies from initial hearings).

Amici urge the Court to apply the exhaustion requirement in a manner consistent with preserving the collaborative paradigm[5] designed by Congress to accomplish the IDEA's express educational purposes. Congress intended the IDEA to govern the provision of educational services to children with disabilities. 20 U.S.C. § 1400(d)(1) ("The purposes of [the IDEA] are .

(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; (B) to ensure that the rights of children with disabilities and parents of such children are protected; (C) and to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities."). Given the importance of these purposes, numerous courts have rejected attempts to circumvent the IDEA's cooperative and remedial scheme through artful pleading. *See* Resp. Br. at 28-31.

---

[5] Research and resources supporting the indisputable benefits of home-school collaboration are widely available. For example, the website of the National Center on Dispute Resolution in Special Education, www.directionservice.org/cadre, offers extensive materials on topics ranging from hearing officer training, to family and professional resources, to legal information—all for the purpose of increasing the capacity of stakeholders to resolve special education disputes collaboratively, thereby reducing the use of expensive adversarial processes.

B. Congress Consistently and Clearly Has Required Exhaustion in Disputes About Services for Students with Disabilities.

Beginning with the 1975 enactment of the Education for All Handicapped Children Act (EHA) (predecessor of the IDEA), Congress has consistently required parents who disagree with the services provided to their children to exhaust administrative remedies under the (now) IDEA before filing a complaint in court. In the EHA, Congress specifically reserved the right to bring a civil action to a party who is "aggrieved by the findings and decision made [in the due process hearing] who does not have the right to an appeal [to the State education agency], and any party aggrieved by the findings and decision [of the State education agency after an appeal]." Pub. L. No. 94-142, § 615, 89 Stat. 773 (1975).

Congress has preserved this requirement in every subsequent amendment to the statute. After this Court determined in *Smith v. Robinson*, 468 U.S. 992 (1984), that the EHA's carefully crafted and comprehensive scheme was the exclusive remedy for disabled students seeking equal access to public education, Congress passed the Education of the Handicapped Act Amendments of 1986 to make clear that the EHA did not foreclose children with disabilities from pursuing remedies to protect their rights under other laws and the Constitution, but that exhaustion of the EHA's administrative procedures applied to *all* claims that sought relief available under the now-IDEA, no matter the legal authority pled in the complaint. Pub. L. No. 99-457, § 680, 100 Stat. 1145 (1986). The Individuals with Disabilities

Education Act, enacted in 1990 as the successor to the EHA, maintained a similar exhaustion requirement in the procedural safeguards provision. 20 U.S.C. § 1415(i)(2)(A). The IDEA exhaustion requirement at issue here states that ". . . before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter." 20 U.S.C. § 1415(l). In sum, over the past 40 years, Congress has made it clear that before filing a complaint in court, parents must work collaboratively with school officials to resolve the dispute, which may or may not lead to the filing of a due process complaint, a resolution session, mediation, or due process hearing. This exhaustion requirement supports the IDEA's collaborative framework, which Congress has repeatedly and purposefully strengthened over a span of decades. This statutory history illustrates Congress' intent to prevent artful pleading from undercutting long-standing procedures that support the educational goals of the Act.

II. WEAKENING THE IDEA'S EXHAUSTION REQUIREMENT WOULD UNDERMINE THE COLLABORATIVE FRAMEWORK CONGRESS DESIGNED TO RESOLVE EDUCATIONAL MATTERS CONCERNING STUDENTS WITH DISABILITIES.

A. Allowing Parents to Pursue ADA and Section 504 Claims Without First Exhausting IDEA Procedures Will Fundamentally Alter the IEP Process.

As this Court has noted, Congress recognized that each child's individual educational needs should be worked out through a process that begins at the local level and includes ongoing parental involvement. *Smith*, 468 U.S. at 1011. The Third Circuit Court of Appeals has echoed this point: "[T]he needs of handicapped children are best accommodated by having the parents and the local education agency work together to formulate an individualized plan for each handicapped child's education." *D.E. v. Central Dauphin Sch. Dist.*, 765 F.3d 260, 274 (3d Cir. 2014) (quoting *Smith v. Robinson*, 468 U.S. 992, 1012 (1984)). The collaborative IEP process requires a detailed and comprehensive evaluation of the unique needs of a student with disabilities, 20 U.S.C. §1414(d)(1)(A), in order to provide a "full educational opportunity" to that child. 20 U.S.C. § 1412(a)(2). During the development, implementation, and mandatory reviews of the IEP, multiple mechanisms are available to families and schools to work out differences informally, while focusing on the

educational needs of the student. At any time, the school and the family can agree to modify any aspect of the educational plan without the need for the time and expense of legal proceedings.

Parents and schools have been using the IEP due process system successfully for decades. Though each state's system has its own character—and some tend to see more adversarial proceedings than others due to differences in rules about the length of hearings, whether the school district pays hearing expenses, and the like—parties know that when disputes arise about the educational program for an IDEA-eligible student, that statute's procedures must be used. If the Sixth Circuit is reversed, that assumption would evaporate, and the effectiveness of this process would be severely jeopardized. Parents would no longer be required to work collaboratively with school officials, even at the IEP stage. At any point, they could threaten to make any disagreement into a "federal case," or simply withdraw from collaboration and go to court. This would grant near dispositive decision-making power to parents, negate the team approach, and render the IEP process unnecessary and irrelevant.

Under the IDEA, parents have always played a critical and substantial role in the IEP process, but they do not have the right to dictate, by threat of suit or otherwise, what services their child will receive. Instead, their views are considered along with those of teachers, administrators and specialists, such as occupational therapists, school psychologists, and speech and language pathologists. These educational professionals are trained to conduct comprehensive evaluations of the child, in collaboration with the

family, and to consider input from all members of the team before developing an IEP that addresses the child's educational needs in a manner that provides a FAPE. Educational professionals considering how to integrate children with disabilities into regular classrooms may take into account how parentally-proposed placements and services will affect other students. As long as FAPE is provided to the child at issue, the IEP may provide strategies to minimize potential classroom distractions or offer an alternative to the parentally-preferred service based on specific concerns for the welfare or legal rights of other students.[6] For example, the school district here may have had Section 504 obligations to accommodate the dog-allergic students whose parents raised concerns. Finding solutions that balance these competing interests can be challenging for school districts. Nevertheless, using their specialized and team-informed knowledge of the child's needs and their familiarity with district resources, facilities, and pertinent circumstances, school officials are committed to designing individual education plans that are feasible and practical and that make the best use of the district's personnel, programs and services.

If parents are authorized to bypass the IDEA's collaborative process, their children will be deprived of the dedication and expertise that school personnel

---

[6] *See, e.g., Case v. East Meadow Union Free Sch. Dist.*, 514 F.3d 240, 247-48 (2d Cir. 2008) (remanding and ordering district court to dismiss service dog case brought under Section 504 and ADA based on plaintiff's failure to exhaust IDEA administrative remedies; the court noted that the school district's concerns about dog-allergic students and staff and potential classroom distractions implicated the student's IEP and would be best dealt with through the IDEA administrative process).

bring to evaluating students' educational needs, designing comprehensive, integrated individualized education programs, problem-solving and correcting errors. This may have a drastically negative impact on special education students, because a decision regarding whether a particular related service or accommodation, such as service dog, is appropriate will be made by a judge, rather than an IEP team or trained mediator or hearing officer. The judge may not be as well-versed in these specific subjects and may not have the benefit of a detailed factual record from due process hearings that Petitioners' approach would render unnecessary. Moreover, a judge deciding a case under the ADA may consider the educational appropriateness of a particular accommodation irrelevant to the determination of whether the district engaged in intentional discrimination to deprive the child of equal opportunity. An IEP team, by contrast, must develop a program with goals "designed to ...meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum...." 20 U.S.C. § 1414(d)(A)(II)(aa). The IDEA procedures result in a more complete and informed education program for the student.

If this Court allows parents to abandon the IDEA's collaborative process in favor of direct access to litigation, it is likely to reduce confidence in and commitment to the IEP process overall. Parents who know that litigation is always available have the option at any moment to stop engaging in cooperative decision-making and to put pressure on the school district to accede to their demands. If they choose to

exert this pressure through an attorney, the negotiations may become unduly influenced by the financial incentives for attorneys to continue conflict rather than to reconcile quickly.

Financial rather than educational considerations may also color a school district's decisions regarding the dispute. The cost of a particular service or placement demanded by a family often is less than the cost of a federal lawsuit, even when the district is insured. When a district adds that financial cost to the loss of staff time, and the emotional toll litigation takes on all participants, it may decide to avoid it. Even when parents do not exercise the litigation option, the mere possibility may change the dynamic of the IEP process from team-based consensus building to unproductive tension and suspicion. When the threat of litigation, rather than developing an IEP that appropriately addresses the student's educational needs, becomes the driving force of parent-school discussions, the parties have lost sight of the necessity, purpose and effectiveness of the IEP process.

Under the Petitioners' approach, school personnel who have invested time, energy, and resources in developing and implementing IEPs to serve the interests of students with disabilities may become disheartened and cynical. They may feel frustrated at having to defend their good faith efforts to comply with the IDEA against charges of intentional discrimination under Section 504 and the ADA. They may feel confused as to what additional steps they could have taken (other than acceding to the parents' wishes) to avoid such claims. They may become concerned that their carefully developed

educational plans for a child may be overridden or disrupted by a court decision based on criteria other than serving the child's educational needs.

B. Allowing Circumvention of IDEA's Due Process Procedures to Provide Direct Access to Federal Courts Would Forfeit the Benefits of the Administrative Scheme Congress Designed for Resolving Disputes about Appropriate Programs and Services for Students with Disabilities

1. The Vast Majority of Due Process Complaints Are Resolved Without Protracted Hearings

Contrary to the assertions of Petitioners and some of their *Amici*, the IDEA's due process hearing procedures are designed to be more effective and efficient than federal litigation in deciding the appropriateness of educational programs and services. 20 U.S.C. § 1415(f)(3). As the Sixth Circuit Court of Appeals noted, the IDEA calls for a determination to be issued by a hearing officer within 105 days of the initial filing of the complaint. *Fry v. Napoleon Cmty. Sch.*, 788 F.3d 622, 626 (6th Cir. 2015); *see generally* 34 C.F.R. §§ 300.510-.515. During this time period, IDEA procedures provide an opportunity for the parties to try to resolve the complaint through a mandatory resolution meeting (which may result in a binding, enforceable

agreement) or through voluntary mediation before the hearing. 34 C.F.R § 300.510. If the school district has not resolved the complaint within 30 days of the initial complaint, the hearing must commence. The hearing officer then must issue a decision within 45 days. *Id.* § 300.515(a). The hearing officer may grant specific extensions of time at the request of one of the parties. *Id.* § 300.515(c). If the state offers a State level review of the hearing officer's decision, it must be completed within 30 days of issuance of the challenged decision. *Id.* § 300.515(b). State education departments may provide for even tighter timelines. For example, Vermont limits due process hearings to two days, unless the hearing officer determines that more time is needed.[7] The short time frame forces parties to present their cases briefly and efficiently, and to get back to the business of educating the child relatively quickly.

While some due process proceedings do become unduly delayed, this is not the typical outcome. In fact, most due process complaints do not result in a fully adjudicated hearing, suggesting that the IDEA's encouragement of informal resolutions is largely successful. For example, according to U.S. Department of Education data, in 2013-14, only two due process complaints were fully adjudicated in Michigan, compared with 52 that were dismissed or withdrawn before the hearing was held or completed. Both hearings resulted in decisions within the regulatory timelines. In fact, of the 2,813 fully adjudicated IDEA due process hearings that occurred nationwide that year, over 87% resulted in decisions

---

[7] Vermont Rule 2365.1.6.15(e).

within the regulatory timelines or an extended timeline granted by the hearing officer.[8] As in Michigan, the vast majority of due process complaints nationwide (11,222) were resolved without the need for a full blown hearing.[9]

IDEA's relative success with informal resolution contrasts sharply with federal civil rights litigation, where there are no specified timelines for issuing decisions, no mandatory resolution sessions, and final dispositions may take months, if not years. A review of civil rights complaints filed in federal district courts from 1990-2006 showed that the average time to conclude a case was 13.6 months.[10] If a case proceeds with average speed, a child will wait more than a full school year before the trial court makes it decision. This is far from the speedy relief that Petitioners and the U.S. government contend will be available by allowing parents to go directly to court.

---

[8] The U.S. Department of Education monitors the states' compliance with IDEA timelines and requires states to improve when rates fall into an unacceptable range. 34 C.F.R. § 300.603.

[9] U.S. Department of Education, EDFacts: IDEA Part B Dispute Resolution Survey, 2013-14, *available at* www.ed.gov/programs/osepidea/618-data/static-tables /index.html.

[10] U.S. Department of Justice, Bureau of Justice Statistics, Special Report, Civil Rights Complaints in U.S. District Courts, 1990-2006, Table 8 (Aug. 2008), *available at* www.bjs.gov/content/pub/pdf/cvrusdc06.pdf.

2. Due Process Hearing Officers with Particularized Knowledge and Training in Special Education Law and Hearing Procedures Offer Important Benefits

The IDEA specifically requires that disputes adjudicated through due process hearings be decided by impartial state hearing officers who have particularized knowledge about the statute, its implementing regulations, and court interpretations. 20 U.S.C. § 1415(f)(3)(A); 34 C.F.R. § 300.511(c)(1)(ii). States often include additional qualifications for hearing officers, such as experience as an attorney or a professional serving children with disabilities, and proficiency in conducting contested hearings.[11] The U.S. Department of Education has directed state education agencies to ensure that hearing officers are sufficiently trained to meet the statutory requirements.[12] Numerous training opportunities

---

[11] *See, e.g.*, Illinois State Board of Education, Special Education Due Process Hearing Officer Qualifications and Duties (requiring hearing officers to have "a working knowledge of special education and related services), *available at* www.isbe.net/spec-ed/pdfs/dp-hearing-officer-qual.pdf; Texas Education Agency, Division of Special Education, Hearing Officers: Qualifications and Job Requirements (requiring at least five years of active practice of law, with two years in the area of special education, disability law, administrative law or civil rights), *available at* http://ritter.tea.state.tex.us/commissioner/qualif.html.

[12] Assistance to States for the Education of Children with Disabilities and Preschool Grants of Children with Disabilities; Final Rule, 71 Fed. Reg. 46,540 at 46,705 (Aug. 14, 2006) (agency

and materials for such administrative hearing officers on subjects ranging from relevant federal and state legal authority, to case management, to hearing procedures are offered by state governments, educational institutions, and private consultants.[13] In addition to training requirements, states may put in place procedures to evaluate and certify special education hearing officers on a regular basis. *E.g.*, 8 VA. ADMIN. CODE § 20-81-210(D).

These competency requirements are especially important in ensuring that decisions about the appropriate education and services for a student with disabilities are being made by individuals with a thorough grounding not only in the intricacies of disability law but also in the complexities that affect delivery of services to students with disabilities. A due process hearing officer's specialized knowledge and experience help her adhere to the strict administrative timelines, exercise fairness and

---

comments explaining changes in final rules from proposed regulations).

[13] *E.g.*, *15th National Academy for IDEA Administrative Law Judges and Hearings Officers*, Seattle University School of Law (July 12-15, 2016), https://law.seattleu.edu/continuing-legal-education/idea-academy; John Copenhaver, *Due Process Hearing Officer Manual*, Mountain Plains Regional Resource Center Utah State University (Revised 2007), http://www.directionservice.org/cadre/exemplar/artifacts/BIE-9%20DPHO%20manual.pdf; *NYSED Resources for Impartial Hearing Officers*, Office of Special Education of the New York State Education Department and Special Education Solutions, L.L.C., http://www.spedsolutionsgroup.com/index.html; *Hearing Officer Deskbook: A Reference for Virginia Hearing* Officers, Office of the Executive Secretary of the Supreme Court of Virginia (Revised Dec. 2013), http://www.courts.state.va.us/programs/ho/deskbook.pdf.

wisdom in applying more relaxed evidentiary standards, and work with the parents, attorneys, special education advocates, educational experts and other witnesses adeptly, ensuring that all the relevant facts have been adduced and that she reaches a reasoned, well supported decision. In the event a party aggrieved by the hearing officer's decision seeks review by a court, the judge has the benefit of a detailed factual record and legal rationale from a qualified hearing officer. The administrative record can help provide a court with a comprehensive understanding of the child's needs, the efforts the school district has or has not made to meet those needs, the basis for the parents' concerns, the reasons explaining the district's denial of parental requests, the resources available to provide needed services and a host of other factors that may have influenced the hearing officer's decision.[14]

Under Petitioners' approach, a court faced with what amounts to an educational decision is deprived of this crucial information. Even in cases where non-IDEA components must be resolved, the administrative process can shed light on how best to accommodate a child's need in the context of the educational setting.[15]

---

[14] "The purpose of exhaustion is to 'enable[ ] the agency to develop a factual record, to apply its expertise to the problem, to exercise its discretion, and to correct its own mistakes, and is credited with promoting accuracy, efficiency, agency autonomy, and judicial economy.'" *Rose v. Yeaw*, 214 F.3d 206, 210 (1st Cir. 2000) (quoting *Christopher W. v. Portsmouth Sch. Comm.*, 877 F.2d 1089, 1094 (1st Cir. 1989)).

[15] This Court has often recognized the importance of educational considerations when determining the appropriate parameter of

3. IDEA Due Process Procedures Include Important Elements That Seek to Reduce the Burdens of Contested Hearings.

Petitioners' *amici* argue that IDEA due process proceedings are costly, burdensome impediments to families seeking relief for a school district's alleged denial of their rights under Section 504 and the ADA. To the extent this conclusory statement references costs in dollars, there is little, if any, definitive empirical evidence about the actual financial burdens imposed on parents by IDEA due process procedures relative to those associated with undertaking civil rights litigation. While research may not offer hard numbers to either substantiate or refute Petitioners' assertion from a comparative standpoint, it cannot be disputed that civil litigation can be an expensive proposition as well, sometimes dragging litigants through costly and extensive pre-trial discovery and numerous procedural hearings, running up costs for both sides before any consideration of the merits of a case even begins.

---

students' rights under the Constitution and other federal laws. *E.g., Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (student First Amendment free speech rights subject to restriction when disrupting school operations); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (student subject to search in absence of Fourth Amendment probable cause when school official has reasonable suspicion student has violated the law or school rules).

In contrast, federal and state IDEA regulations provide parents certain benefits aimed at easing the burdens that may be associated with contested hearings. These measures particularly benefit low income families in accessing the IDEA's due process system. First, the IDEA requires school districts to help parents find legal counsel by providing parents with information on any free or low cost legal or other relevant services, such as parent advocates, that may be available to assist them. 34 CFR § 300.507(b). The IDEA also eliminates the need for the parties to engage in extended discovery battles by requiring them to exchange all the evaluations and recommendations upon which they intend to rely, *id.* § 300.512(b); each party then has the right to prohibit the introduction of *any* evidence that has not been disclosed to it at least five days before the hearing. *Id.* § 300.512(a)(3).

In many jurisdictions, hearings may be conducted in a more relaxed and open manner than court proceedings. For instance, under many state administrative law frameworks, hearing officers are not constrained by judicial rules of evidence, allowing them to admit evidence that would be ruled inadmissible in courts,[16] and then to give it the appropriate weight necessary to arrive at findings of fact and recommendations of law. This flexibility benefits parents by affording them the opportunity to present testimony or evidence of untested or novel approaches to their child's education that might be

---

[16] *E.g.*, CAL. CODE REGS. tit. 5, § 3082 (2016); MISS. ADMIN. CODE § 32-21: 4.3 (2016); NEV. ADMIN. CODE § 645.560 (2016); N.Y. COMP. CODES R. & REGS., tit. 19, § 400.8 (2016).

excluded under normal evidentiary rules. Relaxed administrative procedures may also reduce potential expenses for parents challenging a school district's determinations, by allowing qualified representatives, parent advocates, or even the parents themselves to appear on their own behalf without incurring the expense associated with legal counsel.[17] In such situations, the benefits of relaxed hearing rules often inures to the non-lawyer parent or advocate who may actually receive substantial assistance from a hearing officer in entering on the record as much information as possible.[18] Thus, the administrative hearing process makes it possible for parents to engage in an impartial process for resolution of their claims without necessarily requiring parents to expend funds associated with a full blown federal trial. Finally, if parents prevail at the administrative hearing stage, the need for court proceedings is averted, and parents are entitled to recover their attorneys' fees, just as they would were

---

[17] *E.g.*, MISS. ADMIN. CODE § 7-4-1: 300.512 (2016); 19 TEX. ADMIN. CODE § 89.1175 (2016).

[18] *See generally*, Jim Gerl, *Bench Skills for Hearing Officials: Conduct and Control of Administrative Hearings*, Presentation at the Annual Conference of the National Association of Hearing Officials November 16 -19, 2014, *22, http://todaycms.s3.amazonaws.com/naho/00/cd38f05bc211e48fab03cef238b12c/Conduct-and-Control-of-Admin-Hearings.pdf ("Particularly where a party is not represented by counsel (such parties are sometimes referred to as 'pro se' parties), the hearing officer has a duty to develop a complete record (citing *Board of Educ. of Victor Central Sch. Dist.*, 27 IDELR 1159 (SEA NY 1998); *Salisbury Township Sch. Dist.*, 26 IDELR 919 (SEA PA 1997); *LBDE Pub. Schs. v Massachusetts Bureau of Special Educ. Appeals*, 59 IDELR 284 (D. Mass. 2012)).

they to succeed in court on claims under Section 504 or the ADA. 20 U.S.C. § 1415(i)(3)(B)-(G).

It is true that the monetary, emotional and relational costs of due process proceedings can escalate for both parents and school districts, particularly when the issues are difficult and the dispute becomes contentious, leading the parties to change their posture from cooperative to adversarial. Much concern has been expressed by schools and disability advocates alike about this unfortunate phenomenon, sometimes called the "judicialization"[19] of IDEA administrative proceedings.[20] This is a departure from congressional intent; indeed, comparable concerns raised in the past led Congress to amend the IDEA to include additional measures, such as mandatory resolution sessions, aimed at encouraging on-going dialog between the parties and opportunities to work out differences before proceeding to a due process hearing; but Congress did not abandon or retreat from due process hearings as the preferred model for schools and parents to engage in formal dispute resolution. Pub. L. No. 108-446, 118 Stat. 2647 (Dec. 3, 2004).

---

[19] The label itself is telling: the more IDEA administrative proceedings mimic court proceedings, the more they are viewed as problematic.

[20] *E.g.*, Perry A. Zirkel and Zorka Karanxha, *Creeping Judicialization In Special Education Hearings?: An Exploratory Study*, University of South Florida Scholar Commons (July 2007), *available at* http://scholarcommons.usf.edu/cgi/viewcontent.cgi?article=1038&context=els_facpub; Tracy G. Mueller, *Alternative Dispute Resolution: A New Agenda for Special Education Policy*, 20 J. OF DISABILITY POL. STUDIES 4-13 (2009).

Similarly, many of the currently proposed solutions, such as facilitated IEP meetings,[21] focus on maximizing the likelihood that parents and schools will reach early agreement on appropriate services for students with disabilities, thereby reducing the need for any formal dispute resolution whether through administrative or court proceedings. In short, to the extent that IDEA administrative proceedings are costly and contentious as a result of their increasing judicialization, it makes little sense to give parents direct access to court to obtain relief readily available under the IDEA.

Petitioners advocate an open path to court as a means to strengthen the ability of families with disabled children to exercise their rights to equal access to educational opportunities. But their purported cure for the ills of IDEA administrative procedures, in fact, produces some equity concerns. As discussed above, the IDEA process, even with its imperfections, provides a relatively level playing field for both families with means and low income families by using more informal rules and practices that can assist parents in securing changes to an IEP without the aid of an attorney. In contrast, federal civil litigation is a proposition open principally to parents who can afford a lawyer able to guide them through

---

[21] *E.g.*, Julie Gentili Armbrust, *IEP Facilitation: Tips of the Trade*, Mediation Northwest (Oct. 1, 2010), *available at* http://www.ode.state.or.us/wma/teachlearn/conferencematerials/sped/2010/iepfacilitationtraining.pdf; *Facilitated Individualized Education Program (FIEP) Procedures: A Guide for Families and Districts*, Office of Special Education West Virginia Department of Education (Aug. 2015), *available at* http://wvde.state.wv.us/osp/compliance/documents/fiep_procedures_guide.pdf.

its complexities. In this way, Petitioners' reading of the exhaustion requirement risks advantaging wealthier families by granting them greater negotiating power through the threat of litigation and a larger share of educational funds expended on litigation or services that benefit only one child. Requiring everyone seeking changes to their child's IEP to first use the IDEA's more accessible and informal procedures benefits all families by promoting a more equitable remedial scheme.

CONCLUSION

Petitioners' position, rather than increasing protection of the rights of students with disabilities, could have consequences that harm more than help. Weakening the IDEA's exhaustion requirement would unnecessarily distort the focus of the collaborative framework and undermine the effectiveness of the procedural safeguards that Congress carefully crafted to facilitate agreement between parents and school on appropriate services to meet the educational needs of children with disabilities. We urge the Court to eschew a decision here that would encourage more "[l]itigation [that] is expensive, time-consuming, and emotionally draining." *Brown v. TD Bank, N.A.*, 2016 WL 1298973, *7 (E.D. Pa. Apr. 4, 2016). Litigation inflicts relational costs that render parents and schools unable to form or maintain the constructive and supportive interaction necessary to the continuing educational well-being of the child at the center of the dispute. It misdirects school districts' already strained financial and operational resources away from serving all children and into wasteful

expenditures on legal costs. Because of these long-lasting and damaging effects, *Amici* urge this Court to affirm the Sixth Circuit's decision.

Respectfully submitted,

Francisco M. Negrón, Jr.
Naomi E. Gittins
NATIONAL SCHOOL BOARDS ASSOCIATION
1680 Duke St
Alexandria, VA 22314
(703)838-6722

Thomas B. Allen
Counsel of Record
W. Joseph Scholler
Alexander L. Ewing
Jack B. Hemenway II
FROST BROWN TODD LLC
9277 Centre Pointe Dr., Suite 300
West Chester, Ohio 45069
(513)870-8200
tallen@fbtlaw.com

October 7, 2016